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THE EXCLUSIVENESS OF THE POWER OF CONGRESS OVER INTERSTATE AND FOREIGN COMMERCE.*

(Continued from page 571.)

After the evolution of the third theory the second theory was absolutely abandoned for a long time. It will therefore

* This article is a consideration of three theories as to the exclusiveness of the power of Congress over interstate and foreign commerce which have been advanced in the opinions of the Supreme Court of the United States

In the preceding part of the article the three theories were considered both from the standpoint of general principles and from that of the actual decisions of the court. The conclusion was reached that on general principles only one theory, called for convenience the exclusive-reserved powers theory, is sound, and that, apart from a few exceptions noted, the decisions of the court wherever either of the other theories conflict with it are consistent with that theory only.

Following that a chronological review of the cases with quotations from the opinions was carried far enough to show the origin of the three theories.

This review of the cases is here continued for the purpose of tracing the theories, their discussion, and disposition through the succeeding cases.

The three theories considered and whose origin was shown, with the designations for convenience attached to them, are: First, the exclusive-reserved powers theory, to the effect that Congress has exclusive power of direct regulation of interstate and foreign commerce; but the states may, in the absence of conflicting legislation by Congress, exercise their

be ignored, except when specially mentioned. It was later re-introduced as a basis for three decisions. These were, however, subsequently overruled, and the second theory disappeared again from the reasoning of the opinions. It was revived again in one recent decision against the most emphatic dissents from four justices. The first and third theories are traceable all through the decisions, first one then the other prevailing, in some cases language appropriate to one being used to express the other.

The consequent number of separate opinions and dissents is remarkable.

It will be sufficient to give the decisions in the more important cases, with a brief statement of the theories on which they are based.

In doing so numerous decisions on taxation will be omitted, because they all agree that if it be once decided that a state tax falls directly on interstate commerce, and is not merely a charge for service rendered, it is unconstitutional, and this without respect to whether the tax is a local one for local purposes or not.

It will be noticed that the decisions are in the main consistent, though if the reasoning were gone into fully, much conflict and confusion would be seen. The reason for this is that the local concurrent sovereignty theory was introduced originally in bridge and pilot cases, where the local idea is especially prominent, and has largely been confined in its application to those and similar cases—ferries, wharves, etc. But the states reserved power over these subjects, so that the reserved power theory leads to the same results in

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reserved powers in local affairs, even though they thereby incidentally and indirectly regulate interstate or foreign commerce.

Second, the general concurrent powers theory, to the effect that Congress and the states have general concurrent jurisdiction over interstate and foreign commerce, and the states may make any regulations of commerce they see fit within their own territories, which will be valid unless they conflict with actual legislation by Congress.

Third, the local concurrent powers theory, growing out of an attempted combination of the two former theories, to the effect that in matters permitting of local regulation the states have concurrent powers with Congress, which they can exercise in the absence of conflicting legislation by Congress, but that in matters permitting of but one uniform or national system of regulation Congress has exclusive power.

such cases. But when the two theories are applied to railroads, river, lake, and coastwise vessels, etc., they lead to different results and produce confusion.

The next case is:

Gilman v. *Philadelphia*, 3 Wallace, 713 (1865).

A statute of Pennsylvania authorizing the erection of a bridge over the Schuylkill at Chestnut Street, Philadelphia, was upheld against the objection of the owner of a wharf just above.

The opinion by Swayne, J., after quoting *Gibbons* v. *Ogden* to the effect that inspection laws, quarantine laws, turnpike roads, ferries, etc., form a part of that immense mass of legislation not granted to the General Government, continues:

"Bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down.

"The power to regulate commerce covers a wide field, and embraces a great variety of subjects. Some of these subjects call for uniform rules and national legislation; others can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively.

"To this extent the power to regulate commerce may be exercised by the states."

"Whether the power in any given case is vested exclusively in the General Government depends upon the nature of the subject to be regulated."

Here the two theories are attempted to be combined. This inconsistency results. The court first says bridges are within that class of subjects power over which was not granted to Congress but is reserved by the states, and then proceeds to say that the states regulate bridges by virtue of a power to regulate interstate commerce in local affairs. But if bridges are a subject over which power was not granted to Congress, then the states regulate them by virtue of their reserved power, and not under the power to regulate commerce, which was granted to Congress. As said in *Gibbons* v. *Ogden*,

"the sources of powers are distinct." In this case both theories are confused.

Crandall v. *Nevada*, 6 Wal. 35 (1867).

The state imposed a tax upon railroad and stage companies of one dollar for every passenger carried out of the state.

The court refers to the fact that the exclusive nature of the grant to Congress was left much in doubt by the earlier cases, this being the case even as late as 1849, as shown by the Passenger Cases; and that in *Cooley* v. *Board of Wardens*[22] the rule was formulated that "whenever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress."

The court then continues:

"Inasmuch, therefore, as the tax does not itself institute any regulation of commerce of a national character, or which has a uniform operation over the whole country, it is not easy to maintain, in view of the principles on which those cases were decided, that it violates the clause of the Federal Constitution which we have had under review."

(Case decided on other grounds, and held unconstitutional.)

The application of the local concurrent sovereignty theory to the facts of the case should be noted. It is entirely logical. This is of particular interest in connection with the next case.

Case of the State Freight Tax, 15 Wal. 232 (1872).

The court declared unconstitutional, so far as it applied to interstate commerce, a statute of Pennsylvania imposing a tax of two cents on every ton of freight carried by railroads. The court, in an opinion by Mr. Justice Strong, says:

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[22] 3 Wal. 713.

"It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the states is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in Congress that no part of it can be exercised by a state. It has, indeed, often been argued, and sometimes intimated, by the court, that so far as Congress has not legislated on the subject, the states may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained state laws, alleged to be regulations of commerce among the states, have been such as related to bridges or dams across streams wholly within a state, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman* v. *Philadelphia*, it was said 'can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively.' However this may be, the rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a state or from one state to another is of this nature. It is of national importance that over that subject there should be but one regulating power, for, etc."

Five things will be especially noted here. First, the statement that the earlier decisions held the exclusive theory; second, that the court has never decided that the power is not exclusively in Congress, because the cases apparently

so holding related to subjects within the control of the states; third, that the general concurrent theory, that the states may legislate on interstate commerce in general, so far as Congress has not, is touched upon and discarded; fourth, that if the last theory were true, then the states could regulate foreign commerce also, for the power over both is conferred by the same words; and, fifth, that it is said to be of national "importance" that over transportation there should be but one regulating power.

The use of the word "importance" is significant. It marks the introduction of the idea of national expediency into the decisions of the court. There are no fixed principles by which to determine what subjects fall within the national and what within the local class, hence ideas of expediency are inseparable from the local concurrent powers theory. But these are legislative questions, whereas the only proper question for the court is the judicial one, Where did the Constitution vest the power over commerce?

The present case is one where the two theories lead to opposite results. The subject, taxation, is not "in its nature national" and it does by its nature admit of more than "one uniform system or plan of regulation." On the local concurrent powers theory the statute should be held constitutional. But the importance of freedom from local taxation is so great that the court brushes aside the logic of the theory, as followed in *Crandall* v. *Nevada* (*supra*), and renders a decision consistent with the exclusive-reserved powers theory only. On the latter theory the tax is a direct burden upon interstate commerce and therefore void.

Through all the succeeding cases on taxation, license requirements, and regulation of rates and charges, with but few exceptions, together with all other cases where the theories conflict, this underlying idea of national "importance" has resulted in decisions inconsistent with a logical application of the local concurrent powers theory and consistent only with the exclusive-reserved powers theory.

Only a few typical cases can be included in this review, but the important fact should be kept in mind that throughout the cases where the theories conflict the decisions can be

logically deduced from the exclusive-reserved powers theory only.

"National importance," under cover of strained applications of the local concurrent powers theory, has induced the court to practically re-confer upon Congress the exclusive power which, it is submitted, that "importance" caused the framers of the Constitution to vest in Congress, and which the exclusive-reserved powers theory logically secures to it. In this case while both theories are confused, the decision is consistent only with the *exclusive-reserved powers theory.*

Welton v. *Missouri*, 91 U. S. 275.

Holds that a license tax on pedlers for selling foreign goods is in violation of the commerce clause; that the sale of goods is a subject requiring national or uniform regulation.

The importance of the principle here involved is very great, but that sales by pedlers can be regulated locally, and that they do admit of "more than one uniform system, or plan of regulation," can hardly be denied. The decision is undoubtedly correct, but is inconsistent with the theory on which it is based, namely, the *local concurrent powers theory.*

Henderson v. *Mayor of New York*, 92 U. S. 259 (1875).

A statute of New York required the master of every vessel from a foreign port to make a report of names, occupations, last residence, etc., of every passenger, and the owner or consignee to give bond in three hundred dollars against each passenger becoming a charge for four years; or in lieu of said bond to pay one dollar and fifty cents for each passenger.

In deciding against the constitutionality of the statute the court first states emphatically that a state cannot, under an expanded definition of the police power, or any other power, attempt to control a subject over which exclusive control has been confined to Congress. From this it proceeds to say that however difficult it may very often be to

distinguish between the one class of legislation and the other, "it is clear, from the nature of our complex form of government, that, whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

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"It is said, however, that, under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the states, and its legislation be valid so long as it interferes with no act of Congress or treaty of the United States.

"But this doctrine has always been controverted by this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree, that under the commerce clause of the Constitution, or within its compass, there are powers which from their nature are exclusive in Congress, etc."

. . . . . .

"It is apparent, therefore, that, if there be a class of laws which may be valid when passed by the states until the same ground is occupied by a treaty or an act of Congress, this statute is not of that class."

The court here distinctly condemns the local concurrent powers theory, and questions the existence of the field of concurrent or "neutral" sovereignty. The logic of the opinion is clearly that of the *exclusive-reserved powers theory.*

Sherlock et al. v. *Alling, Adm'r*, 93 U. S. 99 (1876).

"Two boats engaged in interstate commerce on the Ohio collided within the jurisdiction of Indiana, resulting in the death of a passenger, whose administrator brought this action under a statute of Indiana giving right of action to personal representatives in case of death by tort."

The opinion by Field, J., contains the following language:

"General legislation of this kind, prescribing the liabilities or duties of citizens of a state, without distinction as to pursuit or calling, is not open to any valid objection because it may affect persons engaged in foreign or interstate commerce. Objection might with equal propriety be urged against legislation prescribing the form in which contracts shall be authenticated, or property descend or be distributed on the death of its owner, because applicable to the contracts or estates of persons engaged in such commerce."

. . . . . .

"And it may be said, generally, that the legislation of a state not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit. In our judgment the statute of Indiana falls under this class."

This opinion bases the validity of the statute entirely upon the reserved powers of the state, within which the power to pass such a statute clearly lay, and confirms the *exclusive-reserved powers theory.*

Munn v. *Illinois*, 94 U. S. 113.

A statute of Illinois divided grain elevators and warehouses into three classes, and fixed maximum charges for the storage of grain.

Chicago, etc., R. R. Co. v. *Iowa*, 94 U. S. 155.

A statute of Iowa classified the railroads of the state and established maximum rates of charges for freight and passengers thereon.

Peik v. *Chicago and N. W. Ry Co.*, 94 U. S. 164.

A statute of Wisconsin classified the railroads of the state, and established maximum rates for fare and freight

on persons and property carried within the state, or taken up outside and brought within, or taken up within and carried without, but excepted all carried completely through the state from point without to point without.

The statutes in all three of these cases were resisted in so far as they regulated charges on interstate business, but all three were held constitutional. The reasoning of the court in all three of the cases is that though these instruments of commerce are engaged in interstate as well as state commerce, the state may regulate them until Congress acts with respect to their interstate relations, because they are all situated within the state; and that the state is not deprived of this power merely because to exercise it "may indirectly operate upon commerce outside its immediate jurisdiction."

The language of the court on this point in the first case is: "The warehouses of these plaintiffs in error are situated and their business carried on within the limits of the state of Illinois. They are used by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce itself than the dray or the cart by which, but for them, grain would be transferred from one railroad station to another. Incidentally they may be connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and, certainly, until Congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may indirectly operate upon commerce outside its immediate jurisdiction."

And in the third case: "The law is confined to state commerce, or such interstate commerce as directly affects the people of Wisconsin. Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. With the people of Wisconsin this company has domestic relations. Incidentally, these may reach beyond the state. But, certainly, until Congress undertakes to legislate for those who

are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without."

This is simply saying that a state has full sovereignty over interstate commerce to the extent that it, or its instruments, its subjects, and the people engaged in it, are within the state, subject only to the power of Congress when exercised. It is the discarded general concurrent powers theory of Mr. Justice Taney.

We shall see that it was very quickly again discarded, for these cases were all soon overruled in this respect. But it should be carefully noted because it again cropped up in a recent important decision. The case, then, supports the *general concurrent powers theory.*

Foster v. *Master and Wardens of New Orleans*, 94 U. S. 246 (1876).

An act of Louisiana made it the duty of the Master and Wardens of the port of New Orleans, and forbade others under a penalty, to make surveys of hatches of sea-going vessels arriving, and to make a survey of damaged goods, give certificates for sale at auction of damaged goods, etc.

Opinion by Swayne, J.:

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"That the provisions of this act are regulations of both foreign and interstate commerce is a proposition which requires no argument to support it. They are a clog and a blow to all such commerce in the port to which they relate. Their enactment involved a power which belongs exclusively to Congress, and which a state could not, therefore, properly exercise."

. . . . . .

"The act is not, in the sense of the Constitution, an inspection law. The object of such laws is to certify the quantity and value of articles imported, whether imports or exports, for the protection of buyers and consumers."

. . . . . .

"The purpose of this act is to furnish official evidence for the parties immediately concerned, and where the goods are damaged, to provide for and regulate their sale."

. . . . . .

Here is an example of a state statute as local in its operations as anything could well be, for it was confined to the port of New Orleans, and did not regulate a vessel's conduct outside that port. And yet it was held unconstitutional, even in the absence of legislation by Congress. If the state of Louisiana had concurrent sovereignty over matters of local concern, this statute would be valid. The decision that it is invalid is inconsistent with such theory. The case is another illustration of circumstances where the two theories lead to exactly opposite results, and the decision is another instance of the important fact, worthy of the greatest consideration, that with but few exceptions wherever the theories lead to opposite results the decisions of the court are consistent with the *exclusive-reserved powers theory* only.

McCready v. *Virginia*, 94 U. S. 391 (1876).

The question was the constitutionality of a law of Virginia forbidding others than her citizens from planting oysters in a certain stream within the state.

Held: The state owns the bed of the stream, subject only to the rights of navigation; it owns the tide-waters themselves, and the fish in them so far as they are capable of ownership while running. It is a property right. Regulation of navigation with respect to interstate and foreign commerce has been granted to Congress, but there has been no such grant of power over the fisheries. The state may grant the use of its property to whomsoever it pleases. This is nothing more than a regulation of the use by the people of the state of their common property.

This case is a good example of the fact that the so-called right of the states to regulate interstate commerce in local affairs is really not a right to regulate interstate commerce at all, but is based on property rights and powers of sovereignty not granted to Congress. Thus the right to regu-

late wharves is based upon the state's ownership of the land below tide-water and under the beds of navigable streams. Similarly the powers of the states over roads, ferries, bridges, quarantine, etc., are based immediately, as said by Chief-Justice Marshall, on the reserved powers of the states. This case supports the *exclusive-reserved powers theory.*

Railroad Company v. *Husen*, 95 U. S. 465 (1877).

A statute of Missouri prohibited the driving or conveying of any Texan, Mexican, or Indian cattle into the state between March 1 and November 1 in each year, and making carriers liable for infection from such cattle carried through the state.

The court said:

"It seems hardly necessary to argue at length that, unless the statute can be justified as a legitimate exercise of the police power of the state, it is a usurpation of the power vested exclusively in Congress. It is a plain regulation of interstate commerce, a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the Constitution of the United States to Congress in the same words in which it is given over the other, and in both cases *it is necessarily exclusive.*"

. . . . . .

"We are thus brought to the question whether the Missouri statute is a lawful exercise of the police power of the state. . . . What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."

. . . . . .

"All these exertions of power are in immediate connection with the protection of persons and property against

noxious acts of other persons or such use of property as is injurious to the property of others. They are self-defensive.

"But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to Congress by the Federal Constitution. It cannot invade the domain of the National Government."

. . . . . .

"It (*i.e.*, a state) may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce."

The court here points out that the statute is neither an inspection nor a quarantine law, but an absolute prohibition, applying to all cattle whether diseased or not, and then continues: "Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the Constitution of the United States was designed to secure."

. . . . . .

"The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise, and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Here is a carefully considered express holding by the court that the power of Congress over interstate commerce is the same as its power over foreign commerce, and in both cases is exclusive. It also shows very clearly that the definition of the police power cannot be so loosely expanded as to permit the states to regulate commerce under cover of it. This is important in view of some cases which seem to expand the police power so as to almost make it synonymous with sovereignty. Here, again, we have the court affirming the *exclusive-reserved powers theory*.

Pound v. *Turck*, 95 U. S. 459 (1877).

Under authority of a statute of Wisconsin defendants built a lumber dam across a small navigable stream within the state.

This was held constitutional, the court saying:

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. . . " The principle established by the decisions to which we have referred is that, in regard to the powers conferred by the commerce clause of the Constitution, there are some which by their essential nature are exclusive in Congress, and which the states can exercise under no circumstances; while there are others which from their nature may be exercised by the states until Congress shall see proper to cover the ground by such legislation as that body may deem appropriate to the subject. Of this class are pilotage and other port regulations. *Cooley* v. *Board of Wardens, etc., etc.*"

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(Black Bird Creek Case and *Gilman* v. *Philadelphia* are declared in point, and their principles gone into.)

This opinion is obviously based on the local concurrent sovereignty theory, and yet the application of this theory to the case is not free from difficulty. Dams, such as the one in this case, as likewise the dam in the Black Bird Creek Case, might not be merely matters of local regulation, but might be of national or even international importance in case vessels of other states or other nations wanted access to the waters and places cut off. A similar difficulty exists in applying the exclusive-reserved powers theory. In the application, however, of either theory it is evident that there was no desire or intention to regulate or interfere with commerce, and that the actual interference therewith was trifling. The dam in neither case was erected for the purpose of controlling the movement of vessels or navigation in any way. Nor did the fact that the movement of vessels was controlled help to provide water enough to float the logs or to drain the marsh. It was their power over the water, and

not the commerce upon it, which the states exercised in both cases.

Power over their waters is nothing more than the sovereignty of the states over their territory, for bodies of water are in law land covered by water. The states retain all powers of sovereignty over their waters not granted to Congress. Under their reserved powers they dredge and improve their harbors, and the channels in their rivers and lakes, erect breakwaters, regulate the erection of wharves, construct dams in rivers for slack-water navigation, and undertake other improvements. These affect commerce, but they are merely the development by the states of their own territory in such a way as to increase the facilities for commerce; they are not control of commerce itself.

In the cases at present under consideration the burden upon commerce was so trifling as to be practically ignored. It was neither a means nor an end, but merely an indirect and incidental effect. It would seem that neither of the two cases should, therefore, be considered an invasion of the power of Congress on either of the two theories. This case comes under the *local concurrent powers theory.*

Hall v. *De Cuir*, 95 U. S. 485 (1877).

The question involved was the constitutionality as applied to a steamer engaged in interstate carriage of passengers on the Mississippi River of an act of Louisiana requiring common carriers to give all persons equal privileges in all parts of the conveyances, without discrimination on account of race or color.

Opinion by Waite, C. J.:

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"There can be no doubt but that exclusive power has been conferred upon Congress in respect to the regulation of commerce among the several states. The difficulty has never been as to the existence of this power, but as to what is to be deemed an encroachment upon it; for, as has been often said, 'legislation may in a great variety of ways affect commerce and persons engaged in it without consti-

tuting a regulation of it within the meaning of the Constitution.' "

. . . . . .

" Thus in *Munn* v. *Illinois*[23] it was decided that a state might regulate the charges of public warehouses."

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" By such statutes the states regulate, as a matter of domestic concern, the instruments of commerce situated wholly within their own jurisdictions, and over which they have exclusive governmental control, except when employed in foreign or interstate commerce. As they can only be used in the state, their regulations for all purposes may properly be assumed by the state until Congress acts in reference to their foreign or interstate relations. When Congress does act, the state laws are superseded only to the extent that they affect commerce outside the state as it comes within the state."

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" But we think that it may safely be said that state legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress. The statute now under consideration, in our opinion, occupies that position."

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" While it purports only to control the carrier when engaged within the state, it must necessarily influence his conduct to some extent in the management of his business throughout his entire voyage. His disposition of passengers taken up and put down within the state, or taken up within to be carried without, cannot but affect in a greater or less degree those taken up without and brought within, and sometimes those taken up and put down without."

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[23] 94 U. S. 113.

This opinion is quoted to illustrate the confusion of theories. An express declaration that the power of Congress is exclusive is followed by approval of *Munn* v. *Illinois, supra,* and the idea of general concurrent sovereignty underlying it.

It is said that the states may regulate *for all purposes* the instruments of commerce within their limits until Congress acts with reference to their interstate relations. If this is so, then the states can regulate all interstate commerce until Congress acts, because all persons and all instruments actually engaged in interstate commerce are at all times in one or another of the states.

This is the *general concurrent powers theory,* and is flatly at variance with the *exclusive-reserved powers theory* with which the opinion starts out. The result is that in this case the two theories are confused.

County of Mobile v. *Kimball,* 102 U. S. 691 (1880).

Bill in equity to compel an issue of bonds to pay for improvements to the harbor of Mobile, ordered under an act of Alabama. It was objected that the act conflicted with the commercial power of Congress. The court in an opinion by Mr. Justice Field revives the local concurrent theory into full vigor, saying, among other things:

"The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting state provisions, was necessarily intended only for cases where such uniformity is practicable. Where from the nature of the subject or the sphere of its operation the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated, state action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the state authority is superseded."

If this doctrine were applied to transportation, local regulations would soon cripple it.

Note also the substitution and confusion of the idea of uniform regulation for the idea of freedom from local regulation. There are many subjects which it would be unwise

or impracticable to regulate uniformly, but which require freedom from local control, and are best left to the operation of natural laws. There are others which require national but very ununiform regulation, as, for instance, transportation, as witness the building of the Cumberland National Pike to the West, the land grants to the first transcontinental railroads, the necessary differences in railroad rates in different parts of the country, etc.

The introduction of the idea of uniformity obscures the greater and more important object of freedom from local regulation.

He also says what is rather remarkable in view of some of the preceding cases—to wit:

"There have been, it is true, expressions by individual judges of this court, going to the length that the mere grant of the commercial power, anterior to any action of Congress under it, is exclusive of all state authority; but there has been no adjudication of the court to that effect."

The same decision in this case would be reached on the reserved powers theory. The states did not surrender all jurisdiction over or power to improve their bays and harbors any more than they did in the case of roads, highways, and their other territory. The decision is based on the *local concurrent powers theory.*

Gloucester Ferry Co. v. *Penna.*, 114 U. S. 196 (1884).

The question was the right of Pennsylvania to impose a tax on the capital stock of the Ferry Company, which was a New Jersey corporation.

The opinion here is also by Mr. Justice Field, and following the same reasoning holds the tax unconstitutional as being a state regulation of a subject, to wit, interstate carriage of persons and property, which requires uniformity of regulation, and the exclusive control over which is therefore in Congress.

Here again uniformity of regulation is confused with freedom from local regulation.

The decision does not follow logically from the theory, for the subject is essentially local.

The exclusive-reserved powers theory leads to the same decision in this case, but logically, and on sound principles. This tax was a direct burden on the privilege of doing interstate business, and therefore an invasion of the exclusive power of Congress and void.

Brown v. *Houston*, 114 U. S. 622 (1884).

In this case Mr. Justice Bradley, after beginning with an implied question of the local concurrent theory by saying in effect that "if the power of Congress is not exclusive, and the states may make local regulations," concludes that the power is "so exclusive that no state has power to make any law or regulation which will affect the free and unrestrained intercourse and trade between the states." But this is the exclusive-reserved powers theory, and it would have been more consistent to have started out with it.

He then quotes *Railroad Co.* v. *Husen*, *supra*, to the effect that the power is exclusive, and says:

"In short, it may be laid down as the settled doctrine of this court, at this day, that a state can no more regulate or impede commerce among the several states than it can regulate or impede commerce with foreign nations."

In view of this language it is surprising to find, as is the case, that tolls and freights are included in the opinion as subjects which the states can regulate. And in view of such inclusion it is somewhat surprising to find Mr. Justice Bradley concurring in the decision in the next case to the effect that the states cannot regulate freights.

Wabash, etc., Ry. v. *Illinois*, 118 U. S. 557 (1886).

A statute of Illinois forbade railroads to charge less for a long haul than a shorter haul. On the constitutionality of this statute as applied to interstate commerce the court says, in an opinion by Mr. Justice Miller:

"It cannot be too strongly insisted upon that the right of continuous transportation from one end of the country to the other is essential in modern times to that freedom of

commerce from the restraints which the state might choose to impose upon it, that the commerce clause was intended to secure."

. . . . . .

"And it would be a very feeble and almost useless provision, but poorly adapted to secure the entire freedom of commerce among the states which was deemed essential to a more perfect union by the framers of the Constitution, if, at every stage of the transportation of goods and chattels through the country, the state within whose limits a part of this transportation must be done could impose regulations concerning the price, compensation, or taxation, or any other restrictive regulation interfering with and seriously embarrassing this commerce."

It will be noted that this language is in direct conflict with the decisions of the court in the three cases of *Munn* v. *Illinois; Chicago, etc., Ry.* v. *Iowa,* and *Peik* v. *Chicago, etc., Ry.*,[24] quoted *supra.* It is not surprising, therefore, to find that the court first mentions those three cases, and explains that on account of other more prominent questions in them this point was passed upon with but little consideration.

Speaking of these three cases the opinion continues:

"Of the members of the court who concurred in those opinions, there being two dissentients, but three remain, and the writer of this opinion is one of the three. He is prepared to take his share of the responsibility for the language used in those opinions, including the extracts above presented. He does not feel called upon to say whether those extracts justify the decision of the Illinois court in the present case. It will be seen, from the opinions themselves, and from the arguments of counsel presented in the reports, that the question did not receive any very elaborate consideration, either in the opinions of the court or in the arguments of counsel."

So far, then, as the decision and reasoning of these three

[24] All in 94 U. S.

cases on this point is concerned, both are overruled; that is to say, the general concurrent sovereignty theory is again discarded. This opinion is a vigorous one, and though not expressly, it inferentially is based upon *the exclusive-reserved powers theory.*

Robbins v. *Shelby Taxing District,* 120 U. S. 489 (1886).

The State of Tennessee imposed a tax upon drummers selling goods by sample. The payment of this tax was resisted by Robbins, who was selling for an Ohio business house. Tax held unconstitutional.

. . . . . .

The opinion starts out with a statement of a part of the local concurrent powers theory, and yet it proceeds immediately to state a form of the doctrine of the silence of Congress which can flow from the exclusive theory alone; and then shows in the strongest way that the local regulations the states can make are only such as flow indirectly from reserved powers, the most important of which are specified in the opinion; and then proceeds even further to declare that "no regulation can be made directly affecting interstate commerce," and that "in the matter of interstate commerce the United States are but one country, and are and must be subject to one system of regulations," and "the doctrine of the freedom of that commerce except as regulated by Congress is so firmly established that it is unnecessary to enlarge further upon the subject." From the language of one theory it proceeds to the reasoning of the other.

It is an example of the confusion of the language of the two theories in one opinion, though the fundamental reasoning is clear and strongly supports the *exclusive-reserved powers theory.*

Bowman v. *Chicago, etc., Ry.,* 125 U. S. 465 (1887).

The court declares unconstitutional a prohibition law of Iowa forbidding carriers to transport liquors into the state.

"It" (*i.e.*, the state) "may adopt any measures tending, even indirectly and remotely, to make the policy effective until it passes the line of power delegated to Congress under the Constitution. It cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other states of the Union in order to effect its end, however desirable such a regulation might be."

In other words, the court holds that a state cannot make a direct regulation of commerce as a means to an end even though the end be within the power of the state. This case also supports the *exclusive-reserved powers theory.*

Leisy v. *Hardin,* 135 U. S. 100 (1889).

The question involved was the constitutionality of a prohibition law of Iowa forbidding the sale of liquors. The court declared the statute unconstitutional in an opinion by Mr. Chief-Justice Fuller which is worthy of especial note, in which he says:

"The power to regulate commerce among the states is a unit, but if particular subjects within its operation do not require the application of a general or uniform system, the states may legislate in regard to them with a view to local needs and circumstances until Congress otherwise directs; but the power thus exercised by the states is not identical in its extent with the power to regulate commerce among the states. The power to pass laws in respect to internal commerce, inspection laws, quarantine laws, and laws in relation to bridges, ferries, and highways, belongs to the class of powers pertaining to locality, essential to local intercommunication, to the progress and development of local prosperity, and to the protection, the safety, and the welfare of society, originally necessarily belonging to, and upon the adoption of the Constitution reserved by, the states, except so far as falling within the scope of a power confided to the General Government. Where the subject requires a uniform system as between the states, the power controlling it is vested exclusively in Congress, and cannot be encroached upon by the states; and where, in relation to the subject-

matter, different rules may be suitable for different localities, the states may exercise powers which, though they may be said to partake of the nature of the power granted to the General Government, are strictly not such, but are simply local powers, which have full operation until and unless circumscribed by the action of Congress in effectuation of the general power. *Cooley* v. *Port Wardens of Philadelphia.*" [25]

. . . . . .

"It is explained that where state laws alleged to be regulations of commerce among the states have been sustained, they were laws which related to bridges or dams across streams, wholly within the state, or police or health laws, or to subjects of a kindred nature not strictly of commercial regulation."

. . . . . .

"After all, it amounts to no more than drawing the line between the exercise of power over commerce with foreign nations and among the states and the exercise of power over purely local commerce and local concerns."

. . . . . .

"The conclusion follows that, as the grant of the power to regulate commerce among the states, so far as one system is required, is exclusive, the states cannot exercise that power without the assent of Congress, and in the absence of legislation it is left for the courts to determine when state action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end.

"These decisions rest upon the undoubted right of the states of the Union to control their purely internal affairs, in doing which they exercise powers not surrendered to the National Government; but whenever the law of the state amounts essentially to a regulation of commerce with foreign nations or among the states, as it does when it inhibits, directly or indirectly, the receipt of an imported commodity

[25] 12 How. 299.

or its disposition before it has ceased to become an article of trade between one state and another, or another country and this, it comes in conflict with a power which, in this particular, has been exclusively vested in the General Government, and is therefore void."

It will be noted here that, in the first place, the power to regulate commerce among the states is declared a unit. It is not divided up between two or three or four or forty-five state sovereignties, but it is a unit, or, in other words, is in Congress exclusively as an undivided unit power. Secondly, it is held that the powers which the states wield over local affairs, though resembling this power, are not such, but are merely the reserved powers of the state. Thirdly, the line between the two is drawn sharply, and the minute it is determined that an attempted exercise of power by a state is not an exercise of one of these reserved powers, but that it crosses the line and attempts to use the power of Congress, all controversy is at an end, for the attempt is necessarily void.

This is a well-considered holding by this court clearly supporting and expounding the principles which we set out to show have been and should be the true guiding principles under the commerce clause, to wit, those based on the exclusive-reserved powers theory. And yet even in this otherwise very clear-cut language may be seen traces of the influence of the local concurrent sovereignty theory.

Uniform regulation is again confused with freedom from local regulation, and the reference to things requiring uniformity of regulation as distinguished from things admitting of local regulation is in the language of the latter theory, and is inconsistent with the opinion as a whole. After it has once been decided that the power to regulate interstate commerce is a unit power in Congress, and the minute a state crosses the line and attempts to use that power the attempt is void, why is there any necessity—nay, further, why is it not unnecessary, inconsistent, and not permissible—to inquire further as to whether the line has been crossed, and the exclusive, unit power of Congress attempted to be exercised in a local or a general matter?

It should be sufficient to decide that the state has attempted to exercise a power which it has not; for if the power is a unit, and therefore exclusive, in the hands of Congress, it follows necessarily that every statute of a state which is an immediate and direct regulation of interstate commerce is void, whether it regulates it locally or otherwise. This is the *exclusive-reserved powers theory.*

Crutcher v. *Kentucky,* 141 U. S. 47 (1890).

The question was the constitutionality of an act of Kentucky requiring agents of foreign express companies to take out a license and file a statement before doing business that the company has at least one hundred and fifty thousand dollars capital.

Opinion by Bradley, J.:

. . . . . .

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce." . . . "No difference is perceivable between the two."

. . . . . .

"But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce? This is also the *exclusive-reserved powers theory.*

Brennan v. *Titusville,* 153 U. S. 289 (1893).

The question here was the constitutionality of an ordinance of the City of Titusville, Pennsylvania, requiring the obtaining of a license and payment of a fee therefor for soliciting orders and selling goods, when sold to other than manufacturers and merchants.

In the opinion by Mr. Justice Brewer, there are two things

especially worthy of note: first, the statement, with approval thereof, that *Robbins* v. *Shelby Taxing District* " affirms in the strongest language the exclusive power of Congress over interstate commerce;" and, second, the express ruling that the police power cannot impose any direct burden upon interstate commerce. This case may likewise be classified as supporting the *exclusive-reserved powers theory.*

Covington, etc., Bridge Co. v. *Kentucky,* 154 U. S. 204 (1893).

Opinion by Brown, J.:

Involved the power of a state to regulate tolls upon a bridge connecting it with another state without the assent of Congress and without the concurrence of the other state. Held unconstitutional on the local concurrent powers theory.

The subject, however, is one which is essentially local, obviously permits of local regulation, and does not require uniform regulation throughout the country. On the theory on which the opinion is based the statute should therefore logically be held constitutional. But, on the other hand, the subject well illustrates the necessity of freedom from local control to prevent conflicts between states. And on the exclusive-reserved powers theory the statute may be declared unconstitutional logically. It is a direct regulation of interstate business and therefore void.

Held also that *Munn* v. *Illinois, C. B. and Q. R. R.* v. *Iowa,* and *Peik* v. *C. and N. W. Ry., supra,*[26] were overruled by *Wabash, etc., Ry.* v. *Illinois, supra.*[27] Another nail is thus driven in the coffin of the general concurrent powers theory, on which those cases were based. We shall see that it was not sufficient, however, to prevent the resurrection of the theory in one later case. *Local concurrent powers theory.*

Western Union Telegraph Co. v. *James,* 162 U. S. 650 (1895).

The question was the constitutionality of an act of Georgia " To prescribe the duty of electric telegraph companies

[26] All in 94 U. S.
[27] 118 U. S. 557.

as to receiving and transmitting despatches, to prescribe penalties for violation thereof, and for other purposes." The act prescribed a penalty of one hundred dollars for breach of duty or failure to deliver message within one mile of the station.

The court upheld the statute in an opinion by Peckham, J., in which he says:

"In one sense it affects the transmission of interstate messages, because such transmission is not completed until the message is delivered to the person to whom it is addressed, or reasonable diligence employed to deliver it."

. . . . . .

"It is the duty of a telegraph company which receives a message for transmission, directed to an individual at one of its stations, to deliver that message to the person to whom it is addressed with reasonable diligence and in good faith. That is a part of its contract implied by taking the message and receiving payment therefor.

"The statute in question is of a nature that is in aid of the performance of a duty of the company that would exist in the absence of any such statute, and it is in nowise obstructive of its duty as a telegraph company. It imposes a penalty for the purpose of enforcing this general duty of the company. The direction that the delivery of the message shall be made with impartiality and in good faith and with due diligence is not in addition to the duty which it would owe in the absence of such a statute. Can it be said that the imposition of such a penalty for a violation of a duty which the company owed by the general law of the land is a regulation of or an obstruction to interstate commerce within the meaning of that clause of the Federal Constitution under discussion? We think not."

. . . . . .

"While the penalty of the present statute is quite ample for a mere neglect to deliver in some cases, we cannot say that it is so unreasonable as to be outside of and beyond the jurisdiction of the state to enact."

The facts and opinion in this case have been given thus

at length because this case is frequently insufficiently stated and quoted, and a false impression of the true grounds of the decision thereby given. It is often misquoted as though it were merely a direct regulation of the delivery of messages and imposing burdens thereupon. But such is not the case. It is a statute establishing the rights and duties in several respects of common carriers of messages. This is strictly within the reserved powers of the states. Common carriers derive their character as such from, and their rights and duties as such are based upon, the laws of the states. For instance, their liability for negligence and their right to limit this liability depend upon state laws.

Also their right of eminent domain and their consequent duty to serve the public impartially flow from state laws.

Hence the provisions in this act requiring the receiving of messages, and transmission of the same with impartiality, and the liability for cipher messages, are all so clearly within the power of the state that no question is raised as to their validity, even though they may indirectly affect interstate business. The duty to deliver also flows from state laws, and hence the court inquires only whether it may reasonably be considered that it is this power which has been exercised, and not a power to burden and regulate interstate commerce.

The opinion seems to be based upon, and the decision is consistent with, the exclusive-reserved power theory, though the one provision as to the penalty must be admitted to be very near the border-line of unconstitutionality.

A dissenting opinion is based on the case of *Western Union Telegraph Co.* v. *Pendleton*,[28] but that case is distinguishable in that it attempted to regulate the delivery of messages in other states, which was clearly beyond the power of one state, and also in that it prescribed rules for the order and preference to be given in the transmission of messages, and thus directly regulated the conduct of the business itself. For these reasons the statute in that case was very properly held unconstitutional.

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[28] 122 U. S. 347.

Illinois Central R. R. v. *Illinois*, 163 U. S. 142 (1895).

A statute of Illinois required railroads to stop passenger trains at county-seats. Held unconstitutional as applied to an interstate train. The train in question to make the stop had to turn aside from the direct interstate route and run three and a half miles to the station and back again, thus, as said by the court, travelling seven miles which form no part of its course.

The court says:

"This court is unanimously of opinion that this requirement is an unconstitutional hindrance and obstruction of interstate commerce and of the passage of the mails of the United States."

. . . . . .

"The state may doubtless compel the railroad to perform the duty imposed by its charter of carrying passengers and goods between its termini within the state. But so long, at least, as that duty is adequately performed by the company, the state cannot, under the guise of compelling its performance, interfere with the performance of paramount duties to which the company has been subjected by the Constitution and laws of the United States.

The state may make reasonable regulations to secure the safety of passengers, even on interstate trains, while within its borders. But the state can do nothing which will directly burden or impede the interstate traffic of the company or impair the usefulness of its facilities for such traffic."

Particular attention is called to the last sentence, that the state cannot directly burden the interstate business of the company.

Particular attention is also called to the case as a whole, in view of a later case which will follow.

Hennington v. *Georgia*, 163 U. S. 299.

The question was the validity, as applied to an interstate train, of a statute of Georgia making it a misdemeanor to

run a train on Sunday. The court upheld the statute in an opinion by Mr. Justice Harlan, in which he says:

"The well-settled rule is that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those subjects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the state."

. . . . . .

"Local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress of providing for the public health, the public morals, and the public safety, and are not within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce."

Two points are worthy of notice here. One is that a statute purporting to be an exercise of an admitted power, but having no real relation to that power, and being really an invasion of the power of Congress, is invalid. This is the principle involved to some extent in the preceding case, where the court inquires as to whether the statute is reasonably within or "beyond the jurisdiction of the state to enact."

This we will see later was distorted into a new theory of the reasonable exercise of the power of the states. Whether a statute has any reasonable relation to an admitted power, or under color thereof really exercises another power, is, however, as we shall endeavor to point out, quite a different question from whether an admitted power is exercised to a reasonable or unreasonable degree; for where the power

exists the degree of reasonableness of its exercise is for the legislature alone, and not for the courts.

The second point is that the decision is distinctly based upon the reserved powers theory, and it is expressly said that "local laws of the character mentioned have their source in the powers which the states reserved and never surrendered to Congress," etc. The case may therefore be said to rest on the *exclusive-reserved powers theory.*

Chicago, Milwaukee and St. Paul Ry. v. *Solan,* 169 U. S. 133 (1897).

The question here involved was the constitutionality of a statute of Iowa prohibiting common carriers from limiting their liability for negligence.

The statute is sustained in an opinion by Mr. Justice Gray, from which we quote at some length, inasmuch as it will be seen that the statute is "strictly within the scope of the local law," and not a regulation of commerce, and that it explains more fully the principles by which we saw in *Western Union Tel. Co.* v. *James, supra,* that the general duties and liabilities of carriers, including the duty to deliver, rest upon state law. He says:

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measure by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons travelling on interstate trains are as much entitled, while within a state, to the protection of that state, as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of non-feasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a

passenger brought from another state, the right of action for the consequent damage is given by the local law.

"It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject they are rather to be regarded as legislation in aid of such commerce and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

. . . . . .

"The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles." This is also the *exclusive-reserved powers theory.*

Missouri, Kansas and Texas Ry. v. *Hober*, 169 U. S. 613 (1897).

Kansas, to protect her cattle from contagious diseases, made it a misdemeanor for any person, between February 1st and December 1st, to drive into or through, or keep in any county, any cattle capable of communicating Texas fever, and making any person who should do so liable to any person for damages by reason of communication of the disease.

The statute was sustained in an opinion by Mr. Justice Harlan on the ground that it was a proper exercise by the state of its reserved police power to protect the public health, the public morals, and the public safety, and to provide for the redress of wrongs within its limits.

The statute in this case is to be distinguished from the statute in *Railroad Company* v. *Husen, supra.*[29] There the statute applied to all cattle, whether diseased or not. It was held to exceed a proper exercise of the police power, and to amount to a regulation of commerce. Here the statute applied only to cattle capable of causing infection, and gave a remedy only for infection actually caused. This is also the *exclusive-reserved powers theory.*

Lake Shore and Mich. So. R. R. v. *Ohio,* 173 U. S. 285 (1898).

This case should be especially noted. It is the climax of the confusion of reasoning which we have seen accumulating in the foregoing review of the cases. The decision of the court and the general principles underlying the opinion of the majority are fraught with the possibility of so much interference with interstate and foreign commerce by the states as to make it a matter of grave concern whether the court has not erred.

The decision is flatly inconsistent with previous decisions. It was rendered by a bare majority of one. It is based on the twice discarded general concurrent powers theory, which is revived in the majority opinion.

Both the decision and the reasoning on which it is based are hotly controverted by the minority. The very cases quoted by the majority in support of their position are shown by the minority to be against them and are quoted back at them. It is a crowning illustration of the disagreement to which the confusion of the theories leads, and proof, if any were needed, that confusion of reasoning means inconsistency and uncertainty of decision. It fully justifies distinguishing the theories clearly, and the belief expressed at the outset of this article, that to do so would greatly clarify the subject.

The case was an action brought in Ohio against the railroad company to recover a penalty under a statute relating to railroads, providing:

[29] 95 U. S. 465.

"Each company shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village, containing over three thousand inhabitants, for a time sufficient to receive and let off passengers," and providing a penalty for failure to comply.

The railroad company ran three or more trains, but stopped only one, the others being interstate trains, which it refused to stop.

A judgment against the company for the penalty of one hundred dollars was sustained, but the court was divided five to four, and two most able and convincing dissenting opinions were filed.

Notwithstanding the recent more conservative opinions of the court which we have just seen, the majority opinion, which is by Mr. Justice Harlan, takes exceedingly radical ground, and reverts to the discarded general concurrent powers theory of Mr. Justice Taney.

Indeed, the positions taken are so radical that it is necessary to quote from the opinion at some length and comment upon it as we proceed. In the majority opinion the court says:

"The average time required to stop a train of cars and receive and let off passengers is three minutes.

"The number of villages in Ohio containing three thousand inhabitants through which the above trains passed on the day named was thirteen."

. . . . . .

"It is insisted by counsel that these (*i.e.*, *Henington* v. *Georgia*, *supra*, and other cases cited) and observations to the same effect in different cases show that the police powers of the states, when exerted with reference to matters more or less connected with interstate commerce, are restricted in their exercise, so far as the National Constitution is concerned, to regulations pertaining to health, morals, or safety of the public, and do not embrace regulations designed merely to promote the public convenience.

"This is an erroneous view of the adjudications of this

court. While cases to which counsel refer involve the validity of state laws having reference directly to the public health, the public morals, or the public safety, in no one of them was there any occasion to determine whether the police powers of the states extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are, however, numerous decisions by this court to the effect that the states may legislate with reference simply to the public convenience, subject, of course, to the condition that such legislation be not inconsistent with the National Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. As the question now presented is one of great importance, it will be well to refer to some cases of the latter class." This contains the keynote of the whole opinion—to wit, the principle that the legislative power of the states extends to any matters designed "to promote the public convenience or the general welfare."

It is difficult to see where there are any limits to such a power short of sovereignty. Whatever a state legislature thinks for the public convenience or general welfare it can do. This is nothing more nor less than the view set out by Chief-Justice Taney in the License Cases, *supra*, when he says:

"But what are the police powers of a state? They are nothing more nor less than the powers of government inherent in every sovereignty to the extent of its dominions. And whether a state passes a quarantine law, or a law to punish offences or to establish courts of justice, or requiring certain instruments to be recorded, or to regulate commerce within its own limits, in every case it exercises the same power; that is to say, the power of sovereignty, the power to govern men and things within the limits of its dominions."

. . . . . .

"And when the validity of a state law making regulations of commerce is drawn into question in a judicial tri-

bunal, the authority to pass it cannot be made to depend upon the motives that may be supposed to have influenced the legislature, nor can the court inquire whether it was intended to guard the citizens of the state from pestilence and disease, or to make regulations of commerce for the interest and convenience of trade."

We are thus cast back upon the general concurrent powers theory of Chief-Justice Taney, a theory which those of his associates who did not adhere to the exclusive-reserved powers theory of Chief-Justice Marshall soon materially modified into the local concurrent powers theory. In fact, it was so completely discarded that after the time of Chief-Justice Taney we are not able to trace it until we come to the three cases in 94 U. S., which were pronounced but ill considered, and are overruled in *Wabash* v. *Illinois*[30] and in *Covington Bridge Co.* v. *Kentucky*.[31]

But let us examine the cases which are cited to support this public convenience, general welfare theory. The first case cited in the opinion is that of *Gilman* v. *Philadelphia*,[32] *supra*.

But this was the case of a bridge entirely within the limits of the state of Pennsylvania, which therefore had jurisdiction over it by virtue of its reserved powers. Of course, it could exercise this power for the convenience or welfare of the people. Having the power, how else should it exercise it? But there is nothing in the opinion from which even the inference could be drawn that the state can do anything which would promote the general convenience or welfare.

And the same is true of *Pound* v. *Turck*,[33] which is the next case cited in the opinion. This was a case of control of piers and booms for lumbering, over which, together with wharves, etc., the states have reserved powers.

The next case cited is *Escanaba Company* v. *Chicago*,[34]

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[30] 118 U. S. 557.
[31] 154 U. S. 204.
[32] 3 Wall. 713, 729.
[33] 95 U. S. 459, 464.
[34] 107 U. S. 678, 683.

which is also a bridge case, involving the regulation of the bridges over the Chicago River.

Some of the language of that case standing alone is as broad as the language of the present opinion. But it is immediately coupled with reference to roads, canals, bridges, and ferries. It is used in a case where the subject—to wit, a bridge—is admittedly a subject over which the state has jurisdiction, and where the necessity of providing for the convenience of the people using the bridge was the immediate cause of this exercise of local jurisdiction over the bridge.

The opinion read as a whole cannot be construed to mean that a state can make direct regulations of interstate commerce, or use any other power granted to Congress, to promote " the convenience and prosperity of its people."

To Congress is given power " to provide for the common defence and general welfare of the United States." But this means nothing more than that the powers granted to Congress may be used for that purpose. The " welfare clause" alone is not a source of power, and no statute of Congress has ever been based thereon.

Similarly the necessity of providing for the general welfare of its people by a state is not itself a source of power, and state statutes cannot be based on that alone; they must be based on some reserved power of the states.

Therefore to say that the state could enforce the regulation of trains in this case because it promoted the general welfare begs the real question, and assumes that the state was exercising to promote the general welfare a power which it possessed. If on examination it was found that the state was attempting to exercise a power which it did not have, a power which had been granted to Congress exclusively, the whole argument crumbles.

The real question in the case, whether the state was attempting to regulate interstate commerce, and, if so, whether that power belongs exclusively to Congress or not, is thus obscured.

The argument also overlooks the essentially protective character of the police power. This is perhaps the reason it

expands it into sovereignty, and reverts to the twice discarded general concurrent sovereignty idea.

That being the case, it necessarily overlooks the great necessity of freedom from local regulations and the frequent decisions of the court, already noted, which hold that the transportation of passengers cannot be locally regulated, and that the police power cannot be used to directly regulate commerce.

Continuing, the court says: "In what has been said we assumed that the statute is not in itself unreasonable; that is, has appropriate relation to the public convenience, does not go beyond the necessities of the case, and is not directed against interstate commerce."

. . . . . .

"As the cases above cited show, and as appears from other cases, the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the state to protect public interests or to promote public convenience.

"In our judgment the assumption that the statute of Ohio was not directed against interstate commerce but is a reasonable provision for the public convenience is not unwarranted."

This is adequately answered in a dissenting opinion quoted below. The reasonableness of the extent to which a power which exists is exercised is never for the court, but for the legislature. It is an entirely different matter for the court to inquire whether in a given case the legislature may reasonably be said to have exercised a power which it had, or under cover thereof to have really attempted to exercise a power which it did not have.

Again the court says:

"In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the cir-

cumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places within the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping."

In the above, after saying in one line that the regulation in this case was not in itself a regulation of interstate commerce, the court, in the next line, say that it was competent for the state to take into consideration all the circumstances affecting travel within its limits and to make such regulations as were just to all who might pass over the road. This is flatly contradictory. If the state regulated interstate travel for the convenience of its own people wanting to take interstate journeys, as admittedly by this statute it did, it regulated interstate commerce, for interstate travel is interstate commerce. In so doing it interfered with the right of the people of other states to be transported entirely through the state with entire freedom from control by that state of the conduct of the business of their transportation. On this decision every state could stop every train in every hamlet in the state, and there could be no through express trains for the convenience of parties desiring to reach distant points in the course of interstate travel. If it be answered that this would never happen, reply may be made in the language of Chief-Justice Marshall, in *Brown* v. *Maryland*, *supra*,[35] as follows:

"It will not meet the argument to say that this state of things will never be produced; that the good sense of the states is a safeguard against it. The Constitution has not confided this subject to that good sense. It is placed else-

[35] 12 Wheaton, 419.

where. The question is, where does the power reside, not how, or, probably, would it be abused? The power claimed by the state is, in its nature, in conflict with that given to Congress; and the greater or less extent to which it may be exercised does not enter into the inquiry concerning its existence."

A number of other cases are quoted or cited in the opinion in support of the decision.

It is unnecessary to go into these or the opinion at further length, but it is worthy of especial note that Mr. Justice Shiras, with whom concur Brewer, J., and Peckham, J., in an elaborate dissenting opinion, takes up the various cases which the majority rely upon and shows that they do not support the principle claimed by the majority and do not support the decision rendered, but quite the contrary. He quotes quite freely as applicable to the present case *Hall* v. *De Cuir, supra*,[36] to the effect that "State legislation which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress." He quotes back at the majority many cases holding clearly either that the power in Congress is exclusive, or at least that state regulations of interstate transportation are void.

Lack of space prevents going into these, but the following reply to the reasoning of the majority may be quoted:

"Some observations may be ventured on the reasoning employed in the opinion of the court. It is said:

"'In what has been said we have assumed that that statute is not in itself *unreasonable*. In our judgment this assumption is not unwarranted. The requirement that a railroad company whose road is operated within the state shall cause three, each way, of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at any station, city, or village, of three thousand inhabitants, for a time sufficient to receive and let off passengers, so far from being *unreasonable*, will subserve the public interest.'

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[36] 95 U. S. 485.

"But the question of the *reasonableness* of a public statute is never open to the courts. It was not open even to the Supreme Court of the state of Ohio to say whether the act in question was reasonable or otherwise. Much less does the power of the state legislature of Ohio to pass an act regulating a railroad corporation depend upon the judgment or opinion of this court as to the reasonableness of such an act.

"And again: 'It was for the state of Ohio to take into consideration all of the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question, etc., etc.'

"It was, I respectfully submit, just such action on the part of the state of Ohio, and just such reasoning made to support that action, that are forbidden by the Constitution of the United States and by the decisions of this court, hereinbefore cited. If each and every state, through which these interstate highways run, could take into consideration all of the circumstances affecting passenger travel within its limits, and make such regulations as, in the opinion of the legislature, are '*just and for the convenience of its own people*,' then we should have restored the confusion that existed in commercial transactions before the adopting of the Constitution, and thus would be overruled those numerous decisions of this court nullifying state legislation proceeding on such propositions."

. . . . . .

"It is fallacious, as I think, to contend that the Ohio legislation in question was enacted to promote *the public interest*. That can only mean the public interest of the state of Ohio, and the reason why such legislation is pernicious and unsafe is because it is based upon a discrimination in favor of local interests and is hostile to the larger public interest and convenience involved in interstate commerce."

The impossibility of distinguishing this case from the

case of *Illinois Central R. R.* v. *Illinois, supra*,[37] and the failure of the majority even to attempt to do so is pointed out. That is the case in which a train was compelled to go three miles from its course and back again to stop at a county-seat. The statute compelling it was held unconstitutional. Of the majority opinion in respect to this case Mr. Justice Shiras says:

"Beyond the bare allegation that the case of *Illinois Central R. R.* v. *Illinois*[38] is not consistent with the views expressed in the present case, no attempt is made to compare or reconcile the principles involved in the two cases."

. . . . . .

"On what, then, does the court's opinion rely to distinguish the Illinois case from the present case? Merely that the through train in the one case was obliged to go out of its direct route some three or four miles, while in the other the obligation is to stop at towns through which the trains pass. But what was the reason why this court held that the Illinois statute was void as an interference with interstate commerce? Was not the delay thus caused the sole reason? And is there any difference between a delay caused by having to go a few miles out of a direct course in a single instance, and one caused by having to stop at a number of unimportant towns?"

To this may be added the fact that the train in the present case was compelled to stop at thirteen small towns at a total loss of thirty-nine minutes, whereas in the former case the train lost only about fifteen minutes. There is no difference in the power used to compel the one and the power used to compel the other. The inconsistency of the two decisions is so obvious that nothing can be said to make it more so.

And if to this is added the inconsistency of the present decision with the series of cases holding that interstate transportation rates and charges cannot be controlled or

[37] 163 U. S. 142.
[38] Ibid.

interfered with by a state, nor a long and short haul regulation made, nor interstate commerce taxed or burdened, and that interstate commerce cannot be discriminated against in any way whatever in favor of local commerce, it will be seen that the necessity for removing inconsistency and uncertainty of decision from this field of law is great.

But even far beyond this in importance, and fraught with far more danger to the larger interests of the nation, is the possibility, inherent in the general concurrent powers theory, which the majority of the court adopted in this case, of restoring by future decisions confirming the right of the states to make various regulations of interstate commerce, and of interstate transportation in particular, that conflict of local interest and confusion of regulations from which the Constitution designed to free commerce.

In addition to the dissenting opinion of Mr. Justice Shiras there is a dissenting opinion by Mr. Justice White wherein, in a few words, he goes straight to the point. He shows that the statute, under the guise of a police regulation for local convenience, in fact imposes a direct burden on interstate commerce. Also that it discriminates against such commerce in favor of local commerce. For these reasons he holds it unconstitutional.

This with the major premise, implied rather than expressed, is the syllogistic logic of the exclusive theory, and illustrates the way in which that theory permits of the application of the syllogism. In general, the exclusive-reserved powers syllogism is:

All direct regulations of interstate or foreign commerce by a state are unconstitutional.

The statute (in any case) in question is a direct regulation of interstate or foreign commerce.

The statute in question, therefore, is unconstitutional.

Granted the major premise, the one question centres in the minor premise.

In the present case the object and effect is to control the running of interstate trains and the handling of interstate business in favor of local convenience of passengers who

may desire to take an interstate journey from a point without the state of Ohio to a point within, or from a point within the state to a point without. The nature and the object of the statute was, therefore, control of interstate commerce. It does not make this any the less true to say that the object was the local convenience of the people of Ohio and adjacent states, because the local convenience of theirs to be promoted was convenience in interstate journeys to or from Ohio.

Further, if the nature of the power be examined, it is seen at once that the state attempted to regulate directly the conduct of the business of interstate transportation of passengers. The power attempted to be exercised being, therefore, the power to directly control interstate commerce, it can make no difference whether the state attempted to exercise the power as an end or only as a means to an end. In either case, it attempted to exercise a power which it does not possess. The application of the syllogism to this case is, therefore:

All direct regulations of interstate or foreign commerce by a state are unconstitutional.

The statute of Ohio in this case is a direct regulation of interstate commerce.

The statute of Ohio in this case is unconstitutional.

In contrast with the simplicity of this reasoning, and the freedom from local regulations secured forever by this theory, must be placed the confusion and inconsistency resulting from the two other theories, and particularly from the theory of the present case, which is *the general concurrent powers theory.*

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540 (1902).

(Question at issue not in point.)

Opinion by Harlan, J.:

. . . . . .

"The question of constitutional law to which we have referred cannot be disposed of by saying that the statute

in question may be referred to what are called the police powers of the state." . . . "But as the Constitution of the United States is the supreme law of the land," . . . "a statute of a state, even when avowedly enacted in the exercise of its police powers, must yield to that law. No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power to pass such enactment may have been derived."

This is a decided modification of the position in regard to the police power taken by Mr. Justice Harlan in the preceding case.

Campagnie Francaise v. *Board of Health,* 186 U. S. 380 (1902).

A law of Louisiana empowered the Board of Health to exclude healthy persons from an infected district. The board excluded four hundred and eight healthy immigrants brought over on a steamship company's vessel bound for New Orleans. The constitutionality of this law was attacked as a regulation of commerce. Upheld.

Opinion by White, J.:

"In other words, the power exists until Congress has acted to incidentally regulate by health and quarantine laws, even although interstate and foreign commerce is affected."

. . . . . .

"True it is, as said in *Morgan* v. *Louisiana:* 'In all cases of this kind it has been repeatedly held that, when the question is raised whether the state statute is a just exercise of state power or is intended by roundabout means to invade the domain of Federal authority, this court will look into the operation and effect of the statute to discern its purpose. See *Henderson* v. *Mayor of New York,*[39] *Chy Lung* v. *Freeman,*[40] *Cannon* v. *New Orleans.*'"[41]

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[39] 92 U. S. 259.
[40] Ibid. 275.
[41] 20 Wall. 587.

Reid v. *Colorado*, 187 U. S. 137 (1902).

The decision is not of special interest. Opinion by Harlan, J.:

"Again, the acknowledged police powers of a state cannot legitimately be exerted so as to defeat or impair a right secured by the National Constitution, any more than to defeat or impair a statute passed by Congress in pursuance of the powers granted to it. *Gibbons* v. *Ogden*,[42] *Missouri, Kansas and Texas Railway Co.* v. *Haber*." [43]

. . . . . .

If Mr. Justice Harlan in his opinion in the *Lake Shore, etc.*, v. *Ohio* case had applied this doctrine the state of Ohio would not have been permitted to impair the right of untrammelled transportation through the state secured to interstate passengers by the National Constitution.

In the above review of cases it has been necessary to omit numerous decisions on taxation and a number on license requirements and regulation of rates and charges. These are, for the most part, decided on the local concurrent powers theory, to the effect that exclusive power over those subjects is vested in Congress, as in the typical cases of these kinds which are included in the above.

But as pointed out in the cases given as types, the decisions are in reality inconsistent with that theory, and have been brought about by underlying considerations of national expediency. These cases are all cases where that theory and the exclusive-reserved powers theory lead to opposite results. They comprise the greater number of such cases. Their omission from this review of the cases in order to avoid repetition should not lessen the weight and consideration to be given the important fact that, with few exceptions, in all cases where these two theories conflict the decisions are consistent only with the exclusive-reserved powers theory.

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[42] 9 Wheat. 1, 210.

[43] 169 U. S. 613, 625, 626, and authorities cited.

Other cases also of interest have been necessarily omitted. Those cases have been given which show the origin of the three theories and which most conspicuously trace their course down through the opinions of the court. The omitted cases add to the confusion of reasoning, which is still further increased when the dissenting opinions, of which there are a very large number, are gone into.

In conclusion, it is submitted that the cases reviewed show the origination and existence in the opinions of three distinct theories, and prove that these have been the cause of considerable confusion. They furnish abundant illustration that the recognition of the three as distinct theories and the elimination of two of them would clarify the subject. They show that the actual decisions of the court have practically followed one theory to the almost complete exclusion of the other two, notwithstanding their persistency on the face of the opinions, and that simplicity of reasoning and consistency of decision will be greatly promoted should the court specifically declare the elimination of these two theories and its adoption of the exclusive-reserved powers theory alone.

James S. Rogers.